

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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| In the Matter of |) | |
| |) | |
| Request for Review of the Decision of the |) | CC Docket No. 02-6 |
| Universal Service Administrator by the |) | CC Docket No. 96-45 |
| Kentucky Department of Education and |) | CC Docket No. 97-21 |
| Kentucky School Districts Listed in |) | |
| Appendix A; Request for Waiver |) | |
| |) | |

**REQUEST FOR REVIEW OF THE DECISION OF THE
UNIVERSAL SERVICE ADMINISTRATOR BY THE
KENTUCKY DEPARTMENT OF EDUCATION
AND KENTUCKY SCHOOL DISTRICTS LISTED IN APPENDIX A;
REQUEST FOR WAIVER**

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SUMMARY

The Kentucky Department of Education (“KDE” or “Department”), on behalf of itself and the Kentucky school districts listed in Appendix A, hereby appeals the decision of the Universal Service Administrative Company to seek recovery of \$5,764,731.70 from service providers that performed services for Kentucky school districts in 1999-2003 and received disbursements from the Schools and Libraries Universal Service Support Mechanism (“E-Rate”).

In this particular case, the public interest, the effective implementation of the E-Rate program, and overwhelming equitable considerations require the FCC to waive its competitive bidding rules that require posting of a Form 470. KDE brought to fruition the policy goals of the E-Rate program, being the first state in the country to make the Internet available to every classroom – and for tens of millions of dollars less than schools in other states.

Since the creation of E-Rate, KDE has consulted extensively with the Schools and Libraries Division (“SLD”) to ensure that its multi-year procurement approach complied with E-Rate rules. The Department consistently received assurances from SLD that its approach was in compliance. This outcome made sense because requiring KDE to post Forms 470 and open its processes to competitive bidding every year would have undercut the substantial efficiencies KDE had achieved by: (a) destroying the long-term relationship that allowed vendors to offer below-market prices; and (b) necessitating wasteful equipment substitutions, as new service providers’ equipment very likely would be incompatible with Kentucky’s existing infrastructure.

Moreover, the FCC’s guidance at the time of these procurements, appearing in the Commission’s *Tennessee Order*, indicated that state procurement processes – with which Kentucky assiduously complied – were sufficient for achieving competitive outcomes.

Finally, this case raises issues under consideration by the Commission in its ongoing rulemaking concerning the E-Rate program, such as the need for funds recovery rules and a statute of limitations on funds recovery. While the Commission considers these issues and the equities associated with disturbing funding commitments many years old, the agency should – at a minimum – prohibit SLD from pursuing the funds at issue in this case.

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**REQUEST FOR REVIEW OF THE DECISION OF THE
UNIVERSAL SERVICE ADMINISTRATOR BY THE
KENTUCKY DEPARTMENT OF EDUCATION
AND KENTUCKY SCHOOL DISTRICTS LISTED IN APPENDIX A;
REQUEST FOR WAIVER**

Pursuant to section 54.719 of the rules of the Federal Communications Commission (“FCC” or “Commission”),¹ the Kentucky Department of Education (“KDE” or Department), on behalf of itself and the Kentucky school districts listed in Appendix A, hereby appeals the decision of the Universal Service Administrative Company (“USAC”) to seek recovery of \$5,764,731.70 from service providers who performed services for Kentucky school districts in 1999-2003. In Commitment Adjustment Letters sent to Kentucky school districts (listed in Appendix A),² the Schools and Libraries Division (“SLD”) of USAC stated that recovery was necessary because particular school districts failed to post a Form 470 to request goods and services for which the school district sought funding from the Schools and Libraries Universal Service Support Mechanism (“E-Rate”). SLD further asserted that such funding was pursuant to

¹ 47 C.F.R. § 54.719.

² Consistent with USAC instructions, this appeal identifies in Appendix A the specific commitment adjustments KDE is appealing, the Billed Entity Name and the Billed Entity Number. However, the relevant form application number for each of the fund requests at issue is unavailable and, therefore, not included in Appendix A.

a contract entered into prior to July 10, 1997 that subsequently was voluntarily extended beyond the term of the initial contract.³

As discussed below, the public interest, the effective implementation of E-Rate, and overwhelming equitable considerations arising in this case require the FCC to: (a) waive sections 54.504(b) and/or 54.511(d)(1) of its rules;⁴ and (b) instruct SLD to rescind the Commitment Adjustment Letters detailed in Appendix A sent to Kentucky school districts and their service providers. At a minimum, the Commission should direct SLD to suspend all funds recovery proceedings listed in Appendix A until the FCC has completed its ongoing E-Rate rulemaking. In that proceeding, the Commission is considering rules to govern the recovery of previous E-Rate disbursements and a statute of limitation on such recovery – items which could determine the outcome of this case.⁵

I. STATEMENT OF FACTS

A. The Kentucky Education Technology System and the internal connections contracts at issue were designed as long-term relationships in order to achieve “best in class” results at the lowest available price.

KDE’s commitment to cost-effective deployment of technology in Kentucky’s public schools predates the E-Rate program. Under a 1990 mandate from the state legislature, KDE helped develop and implement the Commonwealth’s plan to provide equitable access to technology for all K-12 public school students and teachers – the Kentucky Education

³ Compare 47 C.F.R. §§ 54.504(b), 54.511(c-d).

⁴ 47 C.F.R. §§ 54.504(b), 54.511(d)(1).

⁵ *Schools and Libraries Universal Service Support Mechanism*, Third Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd 26912, ¶ 79 (2003) (“*Second FNPRM*”).

Technology System (“KETS”).⁶ KETS was designed to be a stable, robust, reliable, and secure network infrastructure spanning 1,400 schools in 176 districts. Today, the KETS environment supports more than 700,000 people, including 600,000 students and 125,000 teachers, school staff members, and KDE employees.⁷

After extensive research and testing, KETS incorporated “best in class” standards for about sixty separate pieces of internal connections equipment. Internal connections equipment allows students and administrators to share information and computer resources via an internal school network. It also helps support Internet access from multiple points within a school.⁸ KDE’s “enterprise-wide” approach in rolling out network components is unique in K-12 education. If a Kentucky public school district seeks networking equipment and software, it is *required* to purchase components that meet KETS product standards determined by the state. In addition, school districts are *required* to purchase these components from a state master contract. In return, schools benefit from extensive, expert technology planning, uniform statewide systems, management support from KDE, and below-market prices negotiated by the Commonwealth.⁹

The KETS master plan called for a competitive bidding process at the plan’s launch and annual renewals of existing contracts thereafter, an approach consistent with Kentucky

⁶ See Declaration of David Couch, Kentucky Department of Education Chief Information Officer (dated May 24, 2004) ¶ 3 (“Decl. of D. Couch”).

⁷ See *id.* ¶ 4.

⁸ See *id.* ¶ 5.

⁹ See *id.* ¶ 2.

procurement law.¹⁰ By selecting a particular bidder's product, KDE would select a specific "product standard." Throughout the KETS's multi-year implementation, all Commonwealth public schools would purchase all internal connections equipment and networking software from the vendors selected in order to meet the product standard. Maintaining relationships with specific vendors throughout the plan's implementation was crucial to its success because:

- The prospect of a multi-year, statewide contract was necessary in order to achieve substantial volume discounts for the state's schools; and
- Once Commonwealth schools had installed equipment as per the particular KETS product standard, the equipment of other service providers would not be easily compatible and supportable. Consequently, equipment meeting the original standard would have to be replaced. Thus, should the product standard change midstream, schools would lose their investment in technical skills associated with the original standard, as well as their investment in expensive equipment, which has an anticipated useful life measured in decades.¹¹

In 1992-94, KDE engaged in a competitive bidding process under Kentucky procurement law to identify product standards for internal connections equipment, as defined in detailed Requests for Proposals ("RFPs"). KDE received about ten to fifteen bids for each of the internal connections contracts at issue in this proceeding. In 1994, KDE entered into one to two year contracts with the successful vendors. The contracts provided for renewal in subsequent years if the parties agreed and if the independent Kentucky Finance and Administration Cabinet ("Cabinet") approved the renewal as lawful and in the Commonwealth's best interest.¹²

A contract term substantially longer than a year would have reflected the expectation of the parties concerning the duration of their relationship. KDE and its vendors had strong

¹⁰ See *id.* ¶ 7; Letter of December 2, 2002 from T. Kevin Flanery, Secretary, Finance and Administration Cabinet, Commonwealth of Kentucky to George McDonald, USAC Vice President ("*December 2, 2002 Letter*").

¹¹ See Decl. of D. Couch, ¶¶ 6, 8.

¹² See *id.* ¶¶ 9-11.

incentives to exercise renewal options. Kentucky schools would lose their investment in infrastructure and technical expertise if KDE switched product standards instead of renewing. Vendors would lose the benefits of a statewide, ongoing relationship if they opted not to renew. Nonetheless, KDE structured the contracts with options to renew (instead of a longer initial term) because such is the Commonwealth's custom and because the parties knew that renewals were statutorily permissible under Kentucky procurement law.¹³

B. Kentucky leads the nation in bringing technology to the classroom at the lowest prices available.

The success of KETS in bringing technology to Kentucky schools has been widely recognized.¹⁴ Kentucky was the first state in the union to make the Internet available in every public classroom. In addition, Kentucky leads the nation in the percentage of teachers in high-minority schools whose students use computers during class (over 85%) and ranks fourth nationwide in the percent of high-poverty schools where at least half the teachers use the Internet for instruction (over 80%). The Milken Family Foundation has recognized the state's commitment to providing equal opportunity for all Kentucky students through KETS. Further, the National Center for Educational Statistics reported in 2002 that Kentucky clearly beats the national average in the percentage of schools with LAN/WAN wiring (98%), the percentage of teachers with e-mail accounts provided by the school district (99.99%), and the percentage of students with e-mail accounts provided by the school district (99.9%).

KDE is proud that this success was achieved cost-effectively. Indeed, in its research over multiple years, KDE could not find any price nationwide less than that paid by Commonwealth

¹³ See *id.* ¶ 12.

¹⁴ See *id.* ¶ 16.

schools for key internal connections components.¹⁵ For example, when the online advertised price of a particular file server operating at KETS levels was \$10,781, Kentucky schools purchased this server under the state contract for \$6,340. These low prices were part of every renewed contract, including contracts for which E-Rate discounts were sought.

Two independent third parties have confirmed the competitive nature of KDE's procurement process. In 2004, the Gartner Group (a technology consultancy) confirmed that, with respect to KETS, KDE's costs are "consistently lower than those of its peers." The organization identified the Commonwealth's enterprise-based approach to deploying technology as a "best practice" and a "cost effective investment" that saved millions of dollars.¹⁶ A Milken Family Foundation echoed these conclusions in a 1999 report identifying Kentucky as a model state in the procurement of "quality, low cost, support[able] and interoper[able]" education technology. The report found that KDE's competitive bidding process, by leveraging the state's purchasing power, resulting in savings of approximately \$35 million.¹⁷

C. SLD has repeatedly assured KDE that its procurement processes complied with E-Rate rules.

SLD confirmed that Kentucky's internal connections contracts complied fully with E-Rate rules by funding hundreds of applications from Kentucky school districts worth millions of dollars over five E-Rate Funding Years. As per SLD's specific oral instructions to KDE, KDE annually notified SLD of the renewals of state contracts, by submitting the new contracts themselves to SLD and by indicating on Forms 470 that Kentucky school districts were not

¹⁵ See *id.* ¶ 13.

¹⁶ See *id.* ¶ 14.

¹⁷ See *id.* ¶ 15.

seeking bids due to the presence of an existing, multi-year contract.¹⁸ SLD did not give KDE any indication that its KETS internal connections contracts might raise compliance issues until Fall 2002, after all 176 Commonwealth school districts had installed millions of dollars of internal connections equipment.

At the launch of the E-Rate program, KDE consulted extensively with SLD to confirm that its KETS procurement approach based on Kentucky law complied with E-Rate rules.¹⁹ Based on its reading of the Commission's rules, SLD guidance, and consensus formed among state education commissions, the Department actually decided to rebid some contracts in order to ensure that the Commission's competitive bidding requirements were met. However, KDE was assured that E-Rate rules did not require competitive rebidding of the internal connections contracts at issue in this case.²⁰

When questions concerning KDE's compliance first arose in Fall 2002, KDE pointed out to SLD that rebidding the KETS internal connections contracts would have resulted in substantial waste of E-Rate dollars, as the Commonwealth had already invested \$30-40 million in KETS-compliant infrastructure manufactured by specific vendors. A new vendor's equipment would very likely not be compatible with existing infrastructure. Thus, changing vendors would necessitate replacing tens of millions of dollars of installed, functioning equipment with decades of remaining usable life.²¹ SLD did not reply until March 2004, when it sent hundreds of Commitment Adjustment Letters to Kentucky School districts.²²

¹⁸ *See id.* ¶ 19.

¹⁹ *See id.* ¶ 17.

²⁰ *See id.* ¶ 18.

²¹ *See id.* ¶¶ 20-21.

²² *See id.* ¶ 22.

In light of questions raised concerning KDE's compliance with the Commission's competitive bidding rules, the Department has rebid many of its E-Rate contracts and will continue to do so. Yet, the Commonwealth cannot afford to replace its key internal connections infrastructure.²³ Accordingly, KDE may be forced to forgo potentially millions of dollars in E-Rate discounts because the expense and waste involved in substituting a new vendor's equipment would be of an even greater magnitude.

In addition, if SLD successfully recovers prior E-Rate disbursements from the service providers identified in Appendix A, these companies likely will seek to recoup their losses from Kentucky school districts, KDE and the Commonwealth of Kentucky. Extracting over \$5 million from the Commonwealth's education budget will impose a substantial hardship on Kentucky's education system and the children it serves.

II. THE PUBLIC INTEREST AND COMPELLING EQUITABLE CONSIDERATIONS REQUIRE THE COMMISSION TO WAIVE ITS COMPETITIVE BIDDING REQUIREMENTS IN THIS PARTICULAR CASE.

The Commission has general authority to suspend, waive, or amend its rules on its own motion for "good cause."²⁴ "Good cause" exists to waive a Commission rule where "special circumstances" warrant a deviation from the general rule, and such a deviation would better serve the public interest than strict adherence to the general rule.²⁵ In deciding whether to grant a waiver, the Commission may take into account considerations of hardship, equity or more

²³ *See id.* ¶ 23.

²⁴ 47 U.S.C. § 158(d)(2); 47 C.F.R. § 1.3

²⁵ *See WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *aff'd* 459 F.2d 1203 (D.C. Cir. 1972), *cert. denied* 409 U.S. 1027.

effective implementation of overall policy on an individual basis.²⁶ For example, in one E-Rate case, the Commission waived certain E-Rate rules because requiring strict compliance from the applicant district would impose an “impractical and unreasonable hardship” on the applicant.²⁷ Indeed, the Commission has an obligation to seek the public interest in particular cases.²⁸ Specifically, the courts have held that, “a regulation which is not required by statute may, in appropriate circumstances be waived and must be waived where failure to do so would amount to an abuse of discretion.”²⁹ As demonstrated below, “special circumstances” surrounding KDE’s contracts exist that not only merit a waiver, but demand one if equity is to be served.

A. KDE has brought to fruition the public policy goals of the E-Rate program, and the public interest would not have been served had KDE posted Forms 470 on an annual basis.

There is no doubt that in this case the public interest lies in waiving the Commission’s competitive bidding rules – not in punishing an entire state school system for inadvertent failures to adhere strictly to such rules. KDE has been recognized as a model state for its effective implementation of the E-Rate program.³⁰ Under KETS, Kentucky became the first state in the

²⁶ *Request for Waiver by Edcouch-Elsa Independent School District*, Order, 18 FCC Rcd 18763, 18765 (2003) (granting a waiver of E-Rate rules to a school because requiring strict compliance would impose an “impractical and unreasonable hardship” on the school); *see also Request for Review of the Decision of the Universal Service Administrator by Shawnee Library System*, Order, 17 FCC Rcd 11824 (2002); *Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*; *Federal-State Joint Board on Universal Service*, Order, 15 FCC Rcd 7197 (1999).

²⁷ *Request for Waiver by Edcouch-Elsa Independent School District*, 18 FCC Rcd at 18765.

²⁸ *See WAIT*, 418 F.2d at 1157.

²⁹ *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1207 (5th Cir. 1995).

³⁰ Kentucky leads or is among the top ten per cent of states in the nation with respect to a number of “technology in education” factors, including daily teacher use of computers in the classroom and student technology leadership programs. *See Report of Governor’s Task Force on K-12 Technology Funding*, KETS (March 2003).

country to make the Internet available to every classroom – and did so for millions of dollars *less* than other states. The network deployment projects at issue here exactly fulfilled Congress’ purpose in creating the E-Rate program: to establish, in a “competitively neutral” way, “economically reasonable[] access to advanced telecommunications and information services” in classrooms.³¹ There is no evidence or allegation in this case of waste, fraud or abuse, only an inadvertent error of a technical nature. Indeed, to require strict adherence under these particular circumstances would undermine the public interest and perversely *require* KDE to engage in wasteful spending of E-Rate funds.

1. The Commission must determine that the internal connections contracts served the public interest because they achieved below-market prices.

Under Commission precedent, the FCC has no choice but to find that the KETS internal connections and software contracts were “competitively neutral,” and moreover, that they served the public interest. The Commission has identified “the lowest possible pre-discount price” as the purpose of a “competitively neutral” bidding process.³² Less than six months ago, the FCC determined that price must be “the primary” factor in selecting a winning bidder for E-Rate services.³³ A contract embodying a *below-market* price must satisfy the purpose of the Commission’s competitive bidding requirements, including the requirement to post a Form 470. Below-market prices that were *the lowest identifiable prices in the United States* are presumptively competitive. The Department was able to negotiate these rates precisely because

³¹ 47 U.S.C. § 254(h)(2).

³² *Federal-State Joint Board on Universal Service*, Order on Reconsideration, 12 F.C.C.R. 10095, 10098 (1997) (“*Recon Order*”).

³³ *See Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District, El Paso, Texas*, 18 FCC Rcd 26406, ¶ 5 (2003) (“*Ysleta Order*”).

statewide contracts with the expectation of renewal leveraged the state's buying power.³⁴ These low prices were carried over at each renewal, and the revised contracts were approved by the Kentucky Finance and Administration Cabinet, an agency separate from KDE.

Further, in the founding orders establishing the E-Rate program, the Commission determined that the "public interest" required the agency to allow schools to apply discounts to their contracts that predated the E-Rate program.³⁵ The FCC rested its decision in part on the finding that, without the expectation of E-Rate discounts, schools like KDE had "strong incentives to secure the lowest rates possible when they negotiated the contracts."³⁶ Further, the FCC "encourage[d] schools...to aggregate their demand [in order to] negotiate lower rates," which Kentucky clearly accomplished.³⁷ Accordingly, because Kentucky so successfully met the Commission's prior assessment of where the public interest lies, the FCC must grant a waiver of its rules in this particular case.

2. Effective implementation of FCC policy in this particular case requires a waiver of the Commission's rules.

Requiring KDE to file Forms 470 and open its ongoing projects to competitive bidding every year would have undercut the ability of the state to fulfill the goals of the E-Rate program. Perversely, due to unique market dynamics emerging from the KETS approach, rebidding actually would have prevented KDE from attaining the "lowest possible pre-discount price" and

³⁴ See Declaration of D. Couch, ¶¶ 7-8, 12, 15.

³⁵ *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, 9027 (1997) ("Order"); cited in support by *Recon Order*, 12 F.C.C.R. at 10097.

³⁶ *Order* at 9063-64.

³⁷ *Order*, 12 FCC Rcd 8776, 9027; cited in support by *Matter of Federal-State Joint Board on Universal Service*, Fourth Order on Reconsideration, 13 F.C.C.R. 5318, 5414, 5452 (1997) ("Fourth Recon Order") (participation in consortia "should enable [schools] to secure telecommunications and information services...under more favorable terms and conditions than they could negotiate alone.")

moreover, would have generated a massive waste of E-Rate funds. Accordingly, in this case, the public interest requires the Commission not to adhere rigidly to Form 470 rebidding requirements.

First, annual rebidding of the KETS internal connections contracts would have eliminated the expectation of vendors that they would provide all internal connections equipment and networking software to all Kentucky public schools seeking such components over multiple years. By design, these expectations were based on the multiyear KETS implementation schedule and the availability of renewals under Kentucky law. Without these expectations, the incentive for these vendors to offer below-market prices would have been undermined and the public interest harmed.³⁸

Second, it made no sense for KDE to rebid the internal connections contracts at issue in this case. The Department could not have accepted an alternative service provider's bid without generating tens of millions of dollars of unnecessary costs. By the time E-Rate funds became available in 1998, the Commonwealth had already spent four years and millions of dollars installing internal connections and networking infrastructure in schools. Such infrastructure is particular to KETS standards and the proprietary technology of KDE's service providers and cannot be substituted easily with other manufacturers' systems.³⁹ Consequently, accepting another bid would require the absurd step of replacing \$30-40 million worth of internal connections equipment, notwithstanding their remaining decades of useful life. Merely rebidding would generate substantial costs. KDE would be required to commit years of staff resources to update the highly technical KETS RFPs and test each of the sixty components

³⁸ See Decl. of D. Couch, ¶¶ 8, 12.

³⁹ *Id.*

proposed by each bidder for compliance with KETS standards.⁴⁰ The Commission has sanctioned the consortium approach to bidding,⁴¹ yet, in this case, the economics of that approach demanded a single, initial competitive bidding process. Given KDE's success in installing technology throughout the state at the lowest available prices, and the improbability that rebidding would produce an alternative superior to renewing existing contracts, stubborn insistence that Forms 470 be posted is an irrational elevation of form over function.

3. None of the adverse outcomes predicted by the Commission if Forms 470 were not posted arose in the present case.

The Commission has based its requirement to post a Form 470 soliciting rebids of existing contracts on the potential for waste, fraud and abuse in non-competitive procurement processes.⁴² Yet, even SLD alleges no waste, fraud or abuse in the case; on the contrary, KDE has been a model of efficient and effective use of E-Rate funds.

None of the adverse outcomes predicted by the Commission if Forms 470 were not posted arose here. The FCC has stated that “prices charged to schools and libraries may be needlessly high” and the Commission’s Form 470 process is “vital to limiting waste, ensuring program integrity, and assisting schools and libraries in receiving the best value for their limited funds.”⁴³ The Commission emphasizes the importance of its competitive bidding requirements to “help[] ensure that schools and libraries receive the lowest possible pre-discount price.”⁴⁴ Yet,

⁴⁰ See *id.* ¶¶ 5, 9.

⁴¹ See *supra*, note 37.

⁴² See *Ysleta Order*, ¶ 22.

⁴³ *Id.*

⁴⁴ *Request for Review of the Decision of the Universal Service Administrator by Roanoke Rapids Graded School District, Roanoke Rapids, North Carolina*, Order, 17 FCC Rcd 23514, 23515-16 (2002) (“*Roanoke Rapids Order*”).

KDE attained the *lowest identifiable prices in the United States* despite contract renewals not occasioned by a Form 470. Further, two sophisticated, independent third parties identified Kentucky’s procurement process as a “best practice” and a “cost effective” model for other states because it saved tens of millions of dollars.⁴⁵

In many cases, Forms 470 might help schools become “informed about the choices available to them” and “minimize the amount of support needed.”⁴⁶ But in this case, a Kentucky blue-ribbon joint committee and KDE spent years researching options and developing the KETS standards, which minimized the support schools needed because the state’s systems were uniform and management lessons could be shared easily. The Commission also was concerned that pre-existing contracts with incumbent carriers might prevent competition;⁴⁷ but this case concerns the highly competitive market for internal connections services. Accordingly, the FCC’s past justifications for requiring strict adherence to its competitive bidding rules do not apply, as the public interest was not harmed through any inadvertent violation.

4. Compelling considerations of the public interest, effective policy implementation and equity require a waiver given the unique nature of the KETS internal connections contracts.

Kentucky schools might have been able to avoid an inadvertent violation of the Commission’s rules if KDE had adopted a KETS internal connections contract with a longer initial term. Instead, in accordance with the custom of Kentucky state government, KDE entered into one to two year contracts with options to renew, knowing that Kentucky law allowed for renewals if in the state’s best interests.⁴⁸

⁴⁵ See Decl. of D. Couch, ¶¶ 14-15.

⁴⁶ *Roanoke Rapids Order*, ¶ 4.

⁴⁷ *Id.*

⁴⁸ See Decl. of D. Couch, ¶ 11.

The mere structure of a contracting relationship should not be the factor on which a \$5.7 million recovery turns, especially given: (a) Kentucky's evident fulfillment of the purposes of the E-Rate program, which would have been undermined if KDE had rebid its contracts at each renewal; and (b) the fact that no cognizable harm arose despite the failure to post a Form 470. Rigid adherence to the Form 470 process in this case would not support the public interest and will impose substantial hardships on Kentucky schools. The Commission is compelled in this case to grant the requested waiver.

B. KDE has relied on SLD assurances that its multi-year contracting approach based on Kentucky procurement law complied with E-Rate competitive bidding rules.

In addition to the considerable public interest benefits delivered by waiving certain competitive rules with respect to KDE, a waiver also is appropriate because KDE's failure to comply with certain E-Rate rules also was the result of its reasonable reliance on the statements and actions of SLD throughout KDE's participation in the E-Rate program. Since the inception of the E-Rate program, KDE has consulted extensively with SLD to ensure that its multi-year procurement processes complied with E-Rate rules and consistently received assurances from SLD that its multi-year approach to procurement was compliant with those rules. KDE had numerous conversations about qualifying contracts in weekly conference calls with SLD.⁴⁹ KDE also submitted, as per SLD's instruction, each contract renewal to SLD seeking review that they were acceptable under program rules.⁵⁰ In its granting of E-Rate funds over five funding years, SLD repeatedly confirmed for KDE that KDE's compliance with state procurement processes was sufficient to achieve competitive outcomes under the E-Rate rules.

⁴⁹ See *id.* ¶ 17.

⁵⁰ See *id.* ¶ 19.

KDE relied on SLD's guidance as it continued to submit funding requests using its multi-year funding approach. That reliance also was bolstered by SLD's repeated grant of those requests and the Funding Commitment Decision Letters ("FCDLs") that communicated those grants. KDE's reliance on SLD's guidance and repeated commitments of funding ultimately led KDE to take services and incur costs to complete work within the prescribed regulatory time frames of each funding year. Furthermore, as multi-year projects, those SLD funding commitments in Year One led to investments the benefit of which could only be realized by similar investments in future years. As a result, the impact of Kentucky school districts' reliance on SLD's incorrect guidance and Year One FCDLs reverberated well into the subsequent years of KDE's E-Rate experience.

While KDE recognizes that it is typically the applicant's responsibility to ensure that their application is in compliance with Commission rules, the circumstances created by SLD's guidance have created anything but a typical situation. As such, the Commission should waive its competitive bidding and funding recovery rules with respect to KDE. In its *Commitment Adjustment Waiver Order*, the Commission granted waivers of its competitive bidding and funds recovery rules for applicants that, like KDE, reasonably relied on incorrect SLD guidance and the mistaken issuance of FCDLs in Year One.⁵¹ As noted above, SLD's incorrect guidance and

⁵¹*Changes to the Board of Directors of the National Exchange Carrier Association, Inc.; Federal-State Joint Board on Universal Service*, Order, 15 FCC Rcd 7197 (Oct. 8, 1999). (analogizing decisions of other agencies regarding recovery of funds from grant programs) (citing *To the Secretary of Health, Education, and Welfare*, September 15, 1971, 51 Comp. Gen. 162 (1971); *To Mr. Secretary: Apr 19, 1972*, B-164031(1), 1972 WL 6886 (stating that there may be exceptional circumstances under which an agency is not required to seek full recovery where it has erroneously provided grant funds to ineligible recipients that failed to comply with the agency's regulations); B-176994, *In the Matter of Chicago Association for Retarded Children; Reimbursement Under Special Food Service Program for Children*, Feb. 12, 1976, 1976 WL 8871 (C.G.) (citing occasions where the Comptroller General "agreed to permit a settlement not strictly authorized by . . . program regulations based on an unusual set of

treatment lasted over five funding years, beginning in Year One of the program. Operating under a multi-year approach, KDE's requests for funding and investments in future years were based, in large part, on the guidance and subsequent FCDLs issued by SLD in the first year of the E-Rate program. Consequently, SLD's Year One errors were partially responsible for both KDE's failure to comply with the rules and the fact that KDE incurred expenses inconsistent with the rules. Accordingly, Kentucky school districts should be granted a waiver for those subsequent years as well.

At a minimum, the Commission should waive recovery of the funds committed by SLD in FCDLs issued in Year Two of the program prior to the Commission's issuance of the *Commitment Adjustment Implementation Order*, the *Commitment Adjustment Waiver Order*, or any other guidance on the proper competitive bidding processes for applicants with pre-existing contracts containing renewal options.⁵² KDE submitted its Forms 470 and, there is every indication that investments related to these funds were made months before the Commission issued the above-mentioned guidance. Penalizing KDE for reliance on SLD commitments made in waves preceding any Commission guidance on the proper Form 470 process simply would be unfair.⁵³

circumstances in which the administrative agency itself was partially responsible either for the failure to comply with the regulations or with the fact that expenses were incurred in violation of the regulations"))).

⁵² Forms 470 for Funding Year Two were filed no later than February 1999. The *Commitment Adjustment Order* and the *Commitment Adjustment Waiver Order* were issued October 8, 1999. The Commission also issued an *Order* clarifying the Forms 470 posting requirement for contracts with renewal options on September 1, 1999 – at least six months after KDE submitted its Year Two Forms 470. *Federal-State Joint Board on Universal Service*, Order, 15 FCC Rcd 6732 (1999) (“*Florida 470 Order*”).

⁵³ At least the first seven funding commitment waves of Funding Year Two came before the Commission issued its first guidance on the proper Form 470 posting requirements for pre-existing contracts with renewal options in its September 1, 1999 *Florida 470 Order*.

C. Contemporaneous FCC guidance indicated that state procurement processes were sufficient for achieving competitive outcomes.

Commission precedent with respect to competitive bidding also strengthened KDE's reliance on SLD's guidance and repeated funding commitments as an indication of program compliance. At the time KDE requested funding and received the FCDLs at issue, Commission precedent established in the *Tennessee Order* held that compliance with state procurement processes was sufficient to achieve competitive outcomes in the E-Rate procurement process.⁵⁴ Under *Tennessee*, SLD could "generally rely on local and/or state procurement processes that include a competitive bid requirement as a means to ensure compliance with our competitive bid requirements."⁵⁵ In addition, *Tennessee* found that, absent contrary evidence, state procurement processes can be relied upon to select the most cost-effective bid and that schools have strong incentives to select the most cost-effective bid.⁵⁶

KDC assiduously complied with Kentucky procurement law,⁵⁷ as required by the *Tennessee Order*. KDE not only complied with the state procurement process, but also eagerly embraced it as a means of realizing considerable cost savings. As noted above, the long-term relationships created by these multi-year contracts allowed vendors to offer below-market prices and avoided the purchasing of redundant or incompatible equipment from multiple vendors, saving millions of dollars. Significantly, these contracts were negotiated before the E-Rate program and the expectation of E-Rate subsidies were a reality. Consequently, KDE had no

⁵⁴ *Request for Review by the Department of Education of the State of Tennessee of the Decision of the Universal Service Administrator*, 14 FCC Rcd 13734 (rel. Aug. 11, 1999) ("*Tennessee Order*").

⁵⁵ *Id.*

⁵⁶ *Tennessee Order*, at 13739.

⁵⁷ *See December 2, 2002 Letter.*

incentive not to strike the hardest bargain possible. Given the clear benefits of the state multi-year procurement process, its legality under Kentucky procurement law, and the Commission's acceptance of such state-sanctioned processes as a means to competitive E-Rate outcomes, KDE was very much justified in selecting the procurement methods it did.

D. The Commission should prohibit SLD from acting while funds recovery is the subject of an ongoing rulemaking.

A waiver also is appropriate because this case raises issues currently under consideration by the Commission in its ongoing rulemaking concerning the E-Rate program. In particular, the Commission's current examination of the necessity of a statute of limitations on funds recovery and revisions to the funds recovery rules have the potential to impact KDE's rights under the E-Rate program drastically.⁵⁸ Accordingly, while the Commission considers these issues and the equities associated with disturbing funding commitments many years old, the agency should prohibit SLD from cutting KDE's prior funding commitments.

SLD seeks to recover funds that it approved and disbursed almost as far back as five years ago. While the Commission is currently considering whether to establish a statute of limitation for the recovery of E-Rate funds, it has recognized the appropriateness of such limitations and adopted them in other areas.⁵⁹ A consensus of commenters in the ongoing rulemaking favors a statute of limitations.⁶⁰ A statute of limitation is important exactly because

⁵⁸ See *Second FNPRM*, ¶¶ 78-85.

⁵⁹ In *Globcom, Inc. d/b/a Globcom Global Communications, Apparent Liability Forfeiture*, 30 CR 538 (Sept. 30, 2003), a carrier failed to make USF and TRS Fund contributions and failed to file accurate revenue statements over a two and a half year time span, but the FCC could only recover forfeitures from the carrier for the previous 12 months because of the one year statute of limitations under section 503(b)(6) of the Act. Under this section of the Act, the FCC may assess forfeitures for violations that accrue within one year of the date of an NAL. This statute of limitations also is reflected in section 1.80(c)(3) of the rules.

⁶⁰ See, e.g., Comments of BellSouth at 6; Comments of Consortium for School Networking and International Society for Technology in Education at 8; Comments of Cox Communications, Inc.

it is patently inequitable to withdraw funding commitments up to five years old on which schools and service providers relied when purchasing and implementing educational technology. A decision allowing the recovery of funds disbursed beyond a date the Commission is simultaneously considering as a cut-off date for such recovery would be equally inequitable.

Likewise, it would be inequitable and inappropriate at this time to recover funds while the Commission considers adopting different funds recovery guidelines. As noted in the recent *Second FNPRM*, the FCC “has not comprehensively addressed the question of what recovery procedures would be appropriate in situations where it is determined that funds have been disbursed in violation of particular programmatic rules that do not implicate statutory requirements.”⁶¹ Instead, “USAC has utilized procedures consistent with the *Commitment Adjustment Implementation Order* for rule violations.”⁶² Until regulations specifically tailored for fund recoveries stemming from rule violations can be adopted, application of the existing commitment adjustment procedures is premature.

III. REQUEST FOR RELIEF

KDE respectfully requests that the Commission (a) waive sections 54.504(b) and/or 54.511(d)(1) of its rules;⁶³ and (b) instruct SLD to rescind the Commitment Adjustment Letters sent to Kentucky school districts and their service providers, as detailed in Appendix A. The public interest in this particular case, the effective implementation of FCC policy embodied in

at 10; Comments of Education and Libraries Networks Coalition at 8; Comments of Verizon at 9 (all filed March 11, 2004).

⁶¹ *Second FNPRM*, ¶ 79.

⁶² *Id.*

⁶³ 47 C.F.R. §§ 54.504(b), 54.511(d)(1).

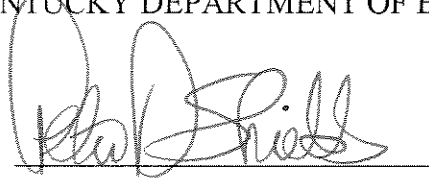
the E-Rate program, and compelling equitable considerations require the Commission to take such action. At a minimum, FCC must order the SLD to forbear from acting on the aforementioned Commitment Adjustment Letters pending the resolution of the agency's ongoing rulemaking concerning E-Rate funds recovery and a statute of limitations thereto.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "Peter D. Shields", written over a horizontal line.

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May 24, 2004

CERTIFICATE OF SERVICE

I, Amy E. Worlton, hereby declare that copies of the foregoing motion were delivered by hand or by U.S. mail, this day, May 24, 2004, to the following:

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May 24, 2004